

<b>ROY A. SUTTON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,447
<b>HIGGINS STONE COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>INSURANCE CARRIER UNKNOWN</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

<sup>1</sup> ALJ Order (May 12, 2008) at 1.

- 1) Did the Administrative Law Judge have jurisdiction to hear a penalties application in light of *Hall v. City of Hugoton*[,] 2 Kan. App. 2[d] 728 under K.S.A. 44-512a.
- 2) Whether the scooter and YMCA are medically necessary as claimant is at MMI. *See Attached*.
- 3) Whether the scooter and YMCA were included in the hearing on May 12 [sic], 2008 under 44-534(a) [sic]. Does the scooter and YMCA comply with the fee schedule under 44-510 [sic]. *See – Any charge from a health care provider which enters into rendering services to any worker in connection with injuries covered by the workers compensation act which is in excess of the fee schedule is unlawful and [sic] void. K.S.A. 44-510(a)(5) [sic]. Furthermore, the director shall have jurisdiction to hear and determine all disputes as to such charges and interest due thereon which become in controversy arising under the fee schedule. K.S.A. 44-510(a)(6) [sic].*<sup>2</sup>

But other than listing the above issues and attaching various exhibits to its brief, the Fund did not provide any argument or authorities in support of its position for the Board to consider in this appeal. Moreover, the Fund did not state what relief it was seeking. Accordingly, the Board assumes the Fund desires the Board to set aside Judge Avery's May 12, 2008, Order.

Conversely, claimant contends the Order should be affirmed. Claimant states Dr. Glenn Amundson is claimant's authorized treating physician by means of an earlier Order for Compensation, which was entered March 2, 2006. In addition, claimant contends that on November 14, 2007, Dr. Amundson prescribed a scooter with a lift and an aquatic program at the YMCA, which is evidenced by exhibits that are attached to both parties' briefs. Claimant argues the scooter, lift, and aquatic program were the focus of the May 8, 2008, hearing before Judge Avery and those items should be considered as authorized as they were prescribed by Dr. Amundson. Finally, claimant admits he does not understand the Fund's concerns regarding the fee schedule but the fee schedule does not override the Fund's responsibility of providing reasonable and necessary medical care to claimant.

The only issue on this appeal is whether Judge Avery erred in entering the May 12, 2008, Order.

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<sup>2</sup> Fund's Brief at 1, 2 (filed June 6, 2008). It appears counsel intends to cite K.S.A. 2001 Supp. 44-510i(c)(3) and K.S.A. 44-510j.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the Division of Workers Compensation's administrative file, the parties' briefs, and the transcript from the May 8, 2008, hearing before Judge Avery, the Board finds and concludes this appeal should be dismissed.

On March 2, 2006, Judge Avery entered an Order for Compensation in which Dr. Amundson was authorized to treat claimant. The Order read in pertinent part:

**Medical treatment is ordered to be paid by the Workers Compensation Fund on claimant's behalf** with Dr. Amundson and referrals until further order or until certified as having reached maximum medical improvement.<sup>3</sup>

Respondent appealed the March 2, 2006, Order for Compensation to this Board, which affirmed the Order.<sup>4</sup>

The transcript from the May 8, 2008, hearing before Judge Avery is very short and provides in pertinent part:

JUDGE AVERY: Okay, counsel, we had discussions off the record, and the claimant is seeking a motion or has filed a motion for penalties because of late payment by the Workers Compensation Fund for several medical expenses. The counsel for the Fund has provided me a case that's saying the Court does not have the authority to issue penalties against the Fund. I think the case is in error, but, nevertheless, I am bound by the determinations of the Court of Appeals, whether they be wrong or right, so I will deny penalties for today's purposes. *However, the Court will direct the Fund to make timely payments for all valid and authorized medical expenses. This would include the most [recent] outstanding expenses. What was it, a scooter?* (Emphasis added.)

MS. POPE: A scooter with a lift, a YMCA aqua therapy program, mileage in the amount of \$36.36.

JUDGE AVERY: And the Court will also direct the Fund to pay the claimant the actual mileage incurred and not try to attempt to justify a lesser payment by Googling the mileage on MapQuest or whatever they do, and use that mileage. The mileage submitted is what they are liable to pay, not what they invent through

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<sup>3</sup> ALJ Order for Compensation (March 2, 2006) at 1.

<sup>4</sup> See *Sutton v. Higgins Stone Company*, No. 1,003,447, 2006 WL 1933424 (Kan. WCAB June 15, 2006).

Googling it. So I will attempt to craft the language and do a formal order and get that to you shortly.

MR. WORKS: Thank you.

MS. POPE: Thank you.<sup>5</sup>

Neither testimony nor exhibits were introduced into the record of that hearing.

There is no dispute that Dr. Amundson prescribed the scooter and aqua therapy program. Indeed, both parties attached to their briefs copies of the doctor's prescriptions. Furthermore, there appears to be no dispute that Dr. Amundson was the authorized physician in November 2007 when he prescribed the scooter and aqua therapy.

The Fund apparently now challenges the May 12, 2008, Order on the following bases: (1) the Judge lacked the jurisdiction to hear a penalties application against the Fund, (2) the scooter and therapy program may not be appropriate as claimant has allegedly reached maximum medical improvement, (3) the cost of those items may exceed the medical fee schedule, and (4) whether the scooter and therapy program "were included in the hearing on May 12 [sic], 2008 under 44-534(a) [sic]."<sup>6</sup>

There is nothing in the record to indicate the Fund raised the above issues, other than the penalties issue, to the Judge. Nevertheless, the issue concerning the Judge's jurisdiction should be addressed as jurisdiction may be raised at any time during a proceeding. In this instance, the Judge ruled that penalties could not be assessed against the Workers Compensation Fund. K.S.A. 44-512a(a) provides, in part:

In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge *and assessed against the employer or insurance carrier* liable for such compensation . . . . (Emphasis added.)

In *Hall*,<sup>7</sup> the Kansas Court of Appeals held penalties could not be assessed against the Workers Compensation Fund under K.S.A. 1977 Supp. 44-512a as that statute addressed only the employer and its insurance carrier. The Court reasoned the legislature intentionally omitted the Workers Compensation Fund from the statute. But the Court of

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<sup>5</sup> M.H. Trans. (May 8, 2008) at 2, 3.

<sup>6</sup> Fund's Brief at 2 (filed June 6, 2008).

<sup>7</sup> *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 587 P.2d 927 (1978).

Appeals did not conclude that the judge lacked the jurisdiction to conduct such a hearing or could not fashion other remedies to enforce its orders against the Fund.

The Board finds the Judge did not lack the jurisdiction to conduct a penalties hearing under K.S.A. 44-512a.

This Board's jurisdiction is limited to reviewing the evidence and issues presented to the administrative law judges. K.S.A. 2007 Supp. 44-555c(a) reads, in pertinent part:

The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and proceedings as presented, had and introduced before the administrative law judge.

Consequently, the remaining issues the Fund raises on this appeal should not be addressed as the record fails to show they were raised to the Judge. Indeed, the transcript from the May 2008 hearing shows the Fund offered no defense at that hearing to claimant's request for payment of the medical bills in question. The Division's administrative file, however, reveals that claimant's application for penalties included a request that the Court direct respondent and the Fund to pay the medical bills in issue, plus penalties.

More importantly, the directive to the Fund to pay authorized medical expenses adds nothing to the Fund's obligation under the earlier March 2, 2006, Order for Compensation. The Fund may not be specifically mentioned in the statute regarding fraud and abuse, K.S.A. 44-5,120. But, at the very minimum, the Fund has a legal obligation to provide and pay for claimant's authorized medical treatment in a timely manner. Counsel should also be aware that pleadings (which would include appeals) that are filed "to cause unnecessary delay or needless increase in the cost of resolving disputed claims for benefits" are grounds for sanctions.<sup>8</sup>

Finally, the Fund's concern regarding the fee schedule is either misplaced or disingenuous. The Workers Compensation Act provides a procedure when a party encounters an expense that exceeds the fee schedule. See K.S.A. 44-510j. The Act also provides that any charges exceeding the fee schedule are "unlawful, void and unenforceable as a debt."<sup>9</sup>

In summary, an administrative law judge has the specific authority under the Workers Compensation Act to conduct a penalties hearing. And the remaining issues

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<sup>8</sup> K.S.A. 44-536a.

<sup>9</sup> K.S.A. 2001 Supp. 44-510i(c)(3).

raised by the Fund on this appeal should be dismissed as they may not be raised for the first time on this appeal.

**WHEREFORE**, the Board dismisses this appeal, leaving the May 12, 2008, Order in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant  
Jeffrey K. Cooper, Attorney for Respondent  
Mark W. Works, Attorney for Fund  
Brad E. Avery, Administrative Law Judge